SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 10 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 71-892

October Term, 1972

LOUIS A. ZAMBRANO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANTHONY V. DECELLO,
Attorney for Petitioner,
200 Lawyers Building,
Pittsburgh, Pennsylania 15219.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
5022 CARLYN DRIVE, PITTSBURGH, PA., 15236,
412-881-7463.

INDEX.

	PAGE
Petition for Writ of Certiorari:	
Petition	1
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Statement of the Case	2
Reasons for Allowance of Writ	3
1. Whether the presumption that possession of recently stolen goods gives rise to an inference of knowledge that the goods were stolen is valid, inasmuch as knowledge was one of the elements to be proven by the Government.	
2. Whether the application of the aforementioned presumption under the facts of the present case resulted in a verdict that was in violation of the Due Process Clause of the Fourteenth Amendment.	
Conclusion	9
Appendix:	
Opinion and Order of District Court	10
Opinion and Order of the Court of Appeals	12

Table of Citations.

Commonwealth vs. Lewis, 159 Pa. Sup. 594	3
Crowell vs. State, 195 Miss. 427, 15 So. 2d 508 (1943)	7
Gaskin vs. State, 119 Ga. App. 593, 168 S. E. 2d 183 (1969)	6
Haynes vs. State, Ala. 222 So. 2d 183 (1969)	7
Miller vs. State, Ind. 236 N. E. 2d 173 (1968)	7
Leary vs. U. S., 395 U. S. 6, 89 S. Ct. 1532, 1548 (1969)	8, 9
People vs. Dupre, 68 Cal Rptr. 525 (1968)	7

	PAGE
State vs. Butler, 9 Ariz. App. 162, 450 P 2d 128 (1969)	6
State vs. Long, 415 P. 2d 171, 173 (1966)	6
State vs. Richmond, 186 Mo. 71, 84 S. W. 880; 882 3	7
Tot vs. U. S., 319 U. S. 462, 63 S. Ct. 1241 (1943)	8
Turner vs. U. S., U. S. 90 S. Ct. 642 (1970)	8, 9
U. S. vs. Gainey, 380 U. S. 63, 85 S. Ct. 754 (1965)	8
U. S. vs. Romano, 382 U. S. 136, 86 S. Ct. 279 (1965)	8

OTHER AUTHORITIES.

Annotation, 68 ALR 187	6

IN THE

Supreme Court of the United States

No. .....

October Term, 1972

LOUIS A. ZAMBRANO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Louis A. Zambrano, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The Opinion of the United States District Court for the Western District of Pennsylvania is printed on page 10 and the Opinion of the Court of Appeals is printed on page 12.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on December 10, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Questions Presented for Review

I. Whether the presumption that possession of recently stolen goods gives rise to an inference of knowledge that the goods were stolen is valid, inasmuch as knowledge was one of the elements to be proven by the Government.

II. Whether the application of the aforementioned presumption under the facts of the present case resulted in a verdict that was in violation of the Due Process Clause of the Fourteenth Amendment.

Statement of the Case

The defendant, Louis Zambrano, was tried before his Honor Judge Gerald Weber of the Federal District Court for the Western District of Pennsylvania on September 28 and 29, 1970 and found guilty of the crime charged, to-wit: Violation of 18 U. S. C. § 659, Possession of goods known to have been stolen from interstate commerce.

The facts presented by the Government through its witnesses were that the defendant sold 1066 cases of Nestles Company products, which were allegedly stolen from an interstate shipment of freight. That the alleged shipment was stolen sometime during the period of time between February 21 and February 23, 1968, at Spring Valley, New York.

The Government then went on to prove that the defendant, Louis Zambrano, either on March 11 or 12, 1968 sold certain cases of Nestles Company products to one Elmer

Mr. Solomon, who was a self-employed merchant. That the defendant, on other occasions in March of 1968, sold other cases of Nestles Company products to Mr. Solomon. That the defendant gave to Mr. Solomon a signed receipt regarding these sales. However, the Government's only contention of knowledge by the defendant that the chocolates were stolen, was the fact that they came into the defendant's possession in such a length of time that such circumstances constituted knowledge. Thus, the only evidence produced by the Government to show knowledge by the defendant that he had in his possession stolen chocolates, was the fact that such goods were recently stolen and, therefore, such inference constituted guilty knowledge.

The judgment of conviction was affirmed by the Court of Appeals on Dec. 10, 1971, thus follows this petition.

Reasons for Allowance of Writ

The presumption that possession of recently stolen goods gives rise to an inference of guilty knowledge of receiving stolen goods should not have been utilized in view of the facts of the present case. It was quite unfair to utilize the presumption of guilty knowledge from possession where possession is an element of the crime to be proved by the Government, and where knowledge is denied by the accused. The essential element of the crime established by utilization of the presumption is that of guilty knowledge. Critical to the operation of the presumption is the absence of an acceptable explanation of possession. This lack of explanation negates the element of guilty knowledge necessary for a conviction. In *Commonwealth vs. Lewis*, it was said that, "one having in his possession goods recently stolen should account for such possession, and his failure to advance a reasonable explanation justifies an inference of guilt," 159 Pa. Sup. 594.

Accepting the Government's testimony as true, it is still requisite to make at least one assumption to establish one element of the crime involved. It is essential to assume that the circumstances were such that the defendant knew or had reason to know that the chocolates were stolen. Although there was no basis whatever on the record for doing so, such assumption was made here utilizing this presumption.

One of the Government's witnesses, on cross examination stated on Page 66 of the record.

By Mr. DeCello:

"Q. Mr. Solomon, how long have you been in the salvage business?

A. Right after my discharge from the Army in 1946.

Q. So approximately 24 years?

A. Approximately.

Q. And have you always been located in the same area?

A. The same area, yes, not the same building.

Q. Now, the salvage business, would you explain for the benefit of the Court and jury exactly what this entails?

A. Well, in salvage the major factor is truck salvage, railroad salvage and bankruptcy goods.

Q. In other words, you deal in all types of goods; is that what you are saying?

A. All things except heavy machinery, something that required heavy transportation.

Q. So besides candy, you buy other things and you resell them too?

A. That is correct, clothing, food items, appliances.

Q. Was this the first time you ever purchased candy?

A. No. Candy is not a very large part, but a very common item to come up in salvage.

Q. So you would say in your experience that candy is an item which pops up more than occasionally?

A. More than occasionally, yes.

Q. So Mr. Zambrano contacted you concerning the purchase of this candy. And the price that was quoted to you, would you deem this price to be reasonable?

A. I must have because I subsequently purchased these goods. It had to be, yes.

Q. Would the price indicate anything to you that this candy would be such below wholesale that it was not worth buying or that there was something wrong with it?

A. I had seen actual samples and I knew that merchandise was good. It was not wormy and it wasn't white from age. And as far as the price, the price was good, below wholesale price. In other words, I couldn't afford to buy regular wholesale price because I had to buy from a jobber then.

Q. Right. Did this price indicate anything to you that this transaction might be anything but legitimate?

A. No, it did not.

Q. That is why you purchased it then, is that correct?

A. That is right.

Q. On page 68 of the record:

Now, Mr. Solomon, what time during the day or evening was this chocolate delivered to your store, do you recall?

A. It is going to be hard to recollect. The store is open at that time it was open from 9:00 until 9:00 at night so — it has to come in those hours.

Q. It was delivered then during the business hours of your store?

A. Right.

Q. And there were patrons in the store while this was being delivered?

A. You mean customers?

Q. Yes.

A. Always.

Q. And Mr. Zambrano signed the receipts that you have indicated as exhibits?

A. That is his signature, yes.

Q. And he was paid for these, is that correct?

A. Yes, he was paid.

Q. In your experience as a salvage dealer for over 24 years, is it your testimony then that this price offered to you for these chocolates is not any indication

of their being illegitimate or legitimate, is that correct?

A. Well, this could be a savings on my part of approximately 20 to 30 percent over wholesale.

Q. Have you ever bought other items at this savings before?

A. Yes, I bought them much better, 50 percent and 60 percent savings sometimes.

Q. And this is the business you are in, is that correct, and you find this type of savings when you are dealing in bankrupt sales and salvage sales?

A. Even bankrupt companies. Some companies when they want to take when they discontinue items off of the field, they want to try it in 20 or 30 days, they sell it at 10 percent of their cost. So it is not indicative of a price.

Mr. DeCello: Thank you very much. I have no other questions."

This witness clearly demonstrates that the sale of the chocolate, *i.e.* price and mode of delivery would not indicate in any stretch of the imagination that this transaction was anything but legal.

While the presumption of fact utilized in this case has been accepted as law in this case, there are however a number of jurisdictions that reject this presumption, See., *e.g. Annotation* 68 ALR 187; citations in *State vs. Long*, 415 P. 2d 171, 173 (1966).

In *State vs. Long, supra*, it was stated:

> "In prosecutions for receiving or concealing stolen goods, however, the weight of authority, and we think the better view, holds that mere possession of recently stolen goods is not sufficient to prove guilty knowledge, in the absence of other proof that the accused knew or had reason to know the goods were stolen." 415 P2d @ 173.

see also *Gaskin vs. State*, 119 Ga. App. 593, 168 S. E. 2d, 183, (1969); *State vs. Butler*, 9 Arz. App. 162, 450 P 2d

128 (1969); *Haynes vs. State*, Ala. 222 So. 2d 183 (1969); *Miller vs. State*, Ind. 236 N. E. 2d 173 (1968); *People vs. Dupre*, 68 Cal Rptr. 525 (1968); *Crowell vs. State*, 195 Miss. 427, 15 So. 2d 508 (1943).

The rationale for this rejection of the presumption was elucidated by the Supreme Court of Missouri in 1904. In *State vs. Richmond*, 186 Mo. 71, 84 S. W. 880, 882-3, it was said:

> "Proof of the possession of stolen property is, of course, competent and essential to substantiate the charge, but the naked possession without proof that the defendant received the goods knowing they had been stolen will not sustain the charge. The very essence of the offense is the receiving knowing them to have been stolen. If the presumption is to be indulged that every person found in . . . possession of stolen goods knows them to be stolen, the state would be relieved to establishing the guilty knowledge, and the burden thrown on the defendant of establishing his innocence."

The court should adopt the position of the Supreme Court of Missouri. In an accusatorial system of justice, the burden of proving all elements of the crime beyond a reasonable doubt has traditionally rested on the Government. No part of such burden should be cast on the accused.

It is quite arbitrary and violative of due process to presume under the facts of the present case that because Zambrano possessed the chocolates, he received them in such a way that he knew or had reason to know that they had been recently stolen.

In two recent cases, the Supreme Court of the United States considered the validity of statutory presumptions similar in nature to the judicial presumption utilized here. Both cases reaffirmed an earlier principle that such a presumption must be considered "irrational" or "arbitrary",

and thus contradictory to due process, unless it can be determined "that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend." *Turner vs. U. S.*, U. S. 90 S. Ct. 642 (1970); *Leary vs. U. S.*, 395 U. S. 6, 89 S. Ct. 1532, 1548 (1969). It is required that there be a "rational connection" between the fact proven and that presumed. There must be a connection between the two in common experience. The inference must have a reasonable relation to common circumstances of life. *Tot vs. U. S.*, 319 U. S. 462, 63 S. Ct. 1241 (1943); see also *U. S. v. Gainey*, 380 U. S. 63, 85 S. Ct. 754 (1965); *U. S. vs. Romano*, 382 U. S. 136, 86 S. Ct. 279 (1965). The primary issue in the two cases was the constitutionality of a statutory inference which was permitted by Federal Statutes proscribing illicit narcotics traffic.

Leary entailed a conviction for transporting marijuana, while *Turner* involved separate convictions for trafficking in heroin and cocaine respectively. The key question in each case was whether one dealing with the illegal drug could be inferred to have received it with knowledge that it was illegally imported. The presumption was voided in *Leary* (marijuana) and in *Turner* regarding the cocaine, but was held valid with respect to the heroin conviction of *Turner*.

Available statistics, testimony and data were evaluated in each case. The Court then determined whether the conclusion that the accused knew the drug to be illegally imported could rationally be permitted to follow from the fact of possession. The test utilized to ascertain whether due process was met was one of rational connection, or "more likely than not", between the fact proved and that presumed. A presumption that cannot stand under such criteria is constitutionally impermissible.

Another more stringent test, mentioned in *Leary* but not utilized there was the "reasonable doubt" standard. The questions was whether a criminal presumption upheld pursuant to previously stated criteria must also satisfy the criminal "reasonable doubt" standard if proof of the crime charged depends upon its use. The Court did not feel it necessary to use this test in *Leary* or in *Turner*, regarding thecocaine since the presumption fell under the less stringent standard. However, with respect to Turner's heroin conviction the presumption was deemed valid even applying this strict standard. Thus, while the Supreme Court never formally adopted this test, it does appear to have been given a limited validity.

Applying the standards promulgated by the Supreme Court, it is apparent that Zambrano's conviction should not be permitted to stand. It cannot logically follow from possession of the chocolates that Zambrano received the same with knowledge that they had been stolen.

Conclusion

The government has failed to prove knowledge, this fact cannot be shown by inference in this instant case. The facts will not support such an inference.

It is strongly urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

ANTHONY V. DECELLO.
Attorney for Petitioner.

APPENDIX

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 68-178.

UNITED STATES OF AMERICA,

vs.

LOUIS A. ZAMBRANO.

Opinion and Order

WEBER, *J.* March 17, 1971

Defendant was convicted of a violation of 18 U. S. C. 659 of possession of goods known to have been stolen from interstate commerce. The evidence showed that chocolate products of the Nestle Company were stolen from an interstate shipment between February 21 and February 23, 1968 in New York State and that defendant offered to sell such products in Pittsburgh on February 28, 1968, and did sell and deliver such products in Pittsburgh, Pennsylvania, on or about March 12, 1968, and thereafter.

The critical element in this case is proof that the defendant had knowledge of the fact that the chocolate had been stolen. The Government's only evidence of such knowledge came from the inference of guilty knowledge from unexplained possession of recently stolen goods.

It may also be noted here that the inference of guilty knowledge from possession is buttressed by the short period of time between the theft and the offer of defendant to sell, and defendant's delivery to a purchaser; the sale of the goods at 20% to 30% less than wholesale; the fresh appearance of the merchandise; all logically call for an explanation to avoid the logical inference of guilty knowledge. This is not an "irrational" or "arbitrary" presumption, but one logically flowing from the facts. Nor is it an "arbitrary" presumption created by statute, as was the case in *Turner v. United States*, 396 U. S. 398 [1970], and *Leary v. United States*, 395 U. S. 6 [1969]. There is a rational connection between the recent theft and defendant's possession here, with the attendant circumstances; a reasonable relation to the common circumstances of life.

We cannot agree that the application of the presumption in this case deprived the defendant of due process, or that such evidence is insufficient to support the jury's finding of guilt.

ORDER.

AND NOW this 17th day of March, 1971, Defendant's Motion for New Trial is DENIED.

GERALD J. WEBER,
United States District Judge.

cc: Richard L. Thornburgh, U. S. Attorney,
633 U. S. Post Office & Courthouse 15219.

Anthony V. DeCello, Esq.,
517 Grant Building 15219.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1787.

UNITED STATES OF AMERICA,

v.

LOUIS ANTHONY ZAMBRANO,
ORLANDO MICHAEL CERMINARA,
ROBERT CHARLES LUCAS,

LOUIS ANTHONY ZAMBRANO,

Appellant.

D. C. Criminal No. 68-178.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted November 18, 1971
Before BIGGS, ADAMS and ROSENN,
Circuit Judges

OPINION OF THE COURT

(Filed December 10, 1971)

PER CURIAM:

The appellant Zambrano contends that the District Court erred in charging the jury that from Zambrano's possession

of recently stolen property the jury could infer that Zambrano knew the property had been stolen. 18 U. S. C. § 659. The stolen goods involved consisted of at least 1066 cases of Nestle chocolate which had been stolen within five days of Zambrano's offer to sell them. Zambrano's contention is without merit. See *Rugendorf v. United States*, 376 U. S. 528, 536 (1964), *United States v. Allegrucci*, 299 F. 2d 811, 814 (3rd Cir. 1962). Other points asserted by the appellant do not require discussion. The judgment of conviction will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-892

LOUIS A. ZAMBRANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of possession of goods known to have been stolen from interstate commerce, in violation of 18 U.S.C. 659. The goods consisted of chocolate products of the Nestle Company which were found in petitioner's possession approximately two weeks following the theft. The trial judge instructed the jury that it could infer petitioner's knowledge of the stolen character of the goods from his recent possession. Following the conviction, the district judge denied a motion for a new trial raising the question whether the instruction was permissible (Pet. App. 10-11).

The court of appeals affirmed *per curiam* rejecting the same contention (Pet. App. 12–13).

These rulings were proper. The federal courts have uniformly determined that an instruction such as was given here meets the test of rationality and hence does not infringe the Fifth Amendment. *E.g., Rugendorf* v. *United States*, 376 U.S. 528, 536–537; *Wilson* v. *United States*, 162 U.S. 613, 619–620; *United States* v. *Hood*, 422 F.2d 737, 741–742 (C.A. 7), certiorari denied, 400 U.S. 820.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972